STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs **Supreme Court Appeals**
No. 154130

KENDRICK SCOTT,

Defendant-Appellant.

Court of Appeals No. 317915
Lower Court No. 99-005393-02-FC

The People's Brief in Opposition to Defendant Kendrick Scott's Application for Leave to Appeal with Appendices A through C

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Counterstatement of Jurisdiction

The People accept the Statement of Jurisdiction set forth by Defendant.

Counterstatement of Questions Involved

I. When an appellate court remands a case with specific instructions, it is improper for a lower court to exceed the scope of that order. According to the Supreme Court's Remand Order, the trial court was to limit itself to a consideration of Charmous Skinner's proposed testimony, that the murderer of his mother was a person other than Kendrick Scott or Justly Johnson, and whether such testimony, either under an ineffective assistance of counsel theory or a newly discovered evidence theory, warranted a new trial; the trial court was not directed by the Remand Order to give an opinion about the type of murder involved or the motive for the murder. But the trial court also did do what it was directed by the Supreme Court's Remand Order to do, that is, to again, determine whether the testimony of Charmous Skinner either under an ineffective assistance of counsel theory or a newly discovered evidence theory, warranted a new trial, and the trial court did not find Skinner to be a credible witness as far as his testimony that he saw the murderer and that it was neither Scott nor Johnson. Is reversal of the trial court's Order denying Scott's Motion for Relief from Judgment warranted?

The People answer no.
Scott answers yes.
The trial court would answer no.

II. Did the trial court abuse its discretion in denying Scott's motion for new trial based on newly discovered evidence due to its finding that the testimony of the victim's son was neither credible nor veracious?

The People answer no.
Scott answers yes.
The trial court would answer no.

III. Should Scott's claims of ineffective assistance of trial and appellate counsel pertaining to the victim's son and evidence of domestic violence fail?

The People answer yes.
Scott would answer no.
The trial court answered yes.

IV. There is no free standing claim of innocence in Michigan jurisprudence, nor should there be; in any event, has Scott shown entitlement to relief under the stringent burden of proof that other states which had recognized such a claim have applied?

The People answer no.
Scott answers yes.
The trial court did not address this question.

The People's Rendition of the Facts

Defendant, Kendrick Scott, hereafter referred to simply as Scott, was convicted following a jury trial before the Honorable Prentis Edwards of first-degree felony murder, MCL 750.316, assault with intent to rob while armed, MCL 70.89, and felony firearm, MCL 750.227b. He was sentenced to life imprisonment for the first-degree murder conviction, to 20 to 30 years imprisonment for the assault with intent to rob while armed conviction, and a consecutive two years for the felony firearm conviction.

Jury Trial

Evidence

Included among the evidence presented at trial were the following testimony and stipulations:

Prosecution

William Kindred

William Kindred testified that he had been married to Lisa Kindred in May of 1999 (Jury Trial Transcript, 05/31/00, 23). They had two children together (23).

On May 9, he and his family, that is, his wife, his wife's son from a previous marriage, CJ, and he and his wife's two children, Sheldon and Dakota, went to a drive-in movie, the Fort Wyoming, in his wife's white minivan, which he had given her for Christmas (24-25). After the movie, they stopped at his sister's house on Bewick in Detroit (25). They stopped because he wanted to talk to his sister's boyfriend, Verlin Miller, about purchasing his (Miller's) motorcycle (25). Only he went into his sister's house, leaving the rest of his family in the minivan, which was parked directly across the street from his sister's house (26). While he was in his sister's house,

his wife Lisa came up to the door, and asked what was taking so long, and if he was going to be coming out soon (26). He responded that he would be out soon (26). When he looked outside again, he saw Lisa in the van (26-27).

Then, as he was still in his sister's house, talking to his sister's boyfriend, he heard a sound like a door slamming (27). He thought that Lisa was coming back up to the house to get him, but, when he looked out the door, he saw the minivan speeding off (27). He heard the tires squeal (27). Then, still looking out the door, he saw a person running through the field (27). Thinking that something was not right, he chased after the person running through the field (27). He was not able to catch up to the person, nor was he able to get a look at the person (27). Meanwhile, his sister's boyfriend had gotten into his truck and had gone looking for Lisa (28). When he came back to his sister's house, after having chased the person running through the field, Lisa was not back yet (28). He went next door to where his mother lived, and while he was over there, his sister called over there, and said that Verlin had found Lisa up at a gas station at the corner of Cadillac and Warren, which was two streets over (28-29). Upon being notified of that, he went up there (28).

By the time that he got to the gas station at Cadillac and Warren, an EMS truck had arrived, and the doors of the minivan were open (29). The EMS people were putting Lisa in the back of the EMS truck (29). He noticed that the driver's side window of the van had been knocked out or shattered (29). The EMS people would not let him go over to his wife (30). The kids were still in the van (30). He got his youngest son out, but the police would not let him get the other kids out because they said that it was a crime scene (30). He never did see Lisa alive again (30). He got the van back along with his wife's purse, which he got from the police station (30). There was a hundred and some odd dollars in his wife's purse (30).

On cross-examination, the witness testified that they arrived at his sister's house at around 12:30 a.m. (31). He was asked if it were not true that that was not a safe neighborhood (32). He responded that he had grown up in that neighborhood, and he had never had any problems there (32). He clarified the timing of the sounds that he heard (35). First, he heard what sounded like a car door slamming (35). That caused him to take a couple of steps toward the door from where he was, in the interior of his sister's house, and when he opened the door, he heard tires squealing (35).

Lillie Harris

Lillie Harris testified that she was William Kindred's older sister (Jury Trial Transcript, 05/31/00, 40). She testified that on May 9, 1999, she was living at 4470 Bewick with her fiancé, Verlin Miller (40). On that date, her brother showed up at her house at around 11:30 p.m. to talk to her fiancé (41). She had not been expecting him (41). She and her daughter were getting ready for bed at that time, so she just said hi and bye to her brother (41). She did not stay up to visit with him (41).

She was awakened at around 1:00 a.m. when her fiancé called on the phone (42). When she got this phone call, she jumped out of bed and went next door to her mother's house (43). Neither her brother nor her fiancé were at her mother's house (43). But her brother did come there while she was over there (43). She did not have much of a conversation with her brother because when he got to their mother's house, her brother immediately got in her mother's car and went to the hospital (43).

She knew who Scott was, although she did not know him personally (65-66). She had seen him before, in her old neighborhood, on Bewick (66). She only knew him by the nickname "Snook" or "Snoop" (69).

As her fiancé was driving around in his truck looking for Lisa, he called her and told her that he thought that something had happened to Lisa (67). Her fiancé sounded all frantic, and he was rambling (67). She threw on some clothes and went outside and starting looking around (67). She looked up and down the street and in the alley, and then, she started to go over to her mother's house, because she heard the front door of her mother's house opening (67).

Just then, she saw a car coming down the street (67). The car pulled up slowly, and, not being familiar with the car, and not knowing who it was, she backed up (67). She then heard somebody call out her nickname, "Peggy" (67-68). She looked in the car, and saw that it was Scott and another guy (67-68). She had never spoken to Scott before (68). Scott asked her if she had seen two guys run by there with a shotgun (68). Scott then told her and her mother, who had by that time come out of her house, that he had seen two guys shoot a girl who had been sitting in a white van (69).

On cross-examination, the witness acknowledged that nowhere in the statement that she gave to the police later that day was there mention of Scott coming upon her and telling her that he had seen two guys shoot a girl in a white van (71-74).

On redirect examination, the witness testified that when she gave a statement at 12:25 p.m. on May 9, the police asked her about a person nicknamed Snoop (74). She told them that she did not know Snoop's real name, but she did know that he lived around the block from her (74). She told the police about the conversation that she had with Snoop around the time of the shooting, and

about how he had asked her if she had seen two guys go by with a rifle (75). The police also asked her if Snoop was alone when she had this conversation with him, and she told the police that he was not, but that he was with another man, a man who she had never seen before (75-76). The police asked her if Snoop had said anything else to her (76). She told the police that Snoop had also said that he had seen a white van across the field (76).

Also on redirect, the witness testified that she believed that she did tell the female detective who came out to her house at around noon on May 9 that Snoop had said to her that he had seen the shooting (80).

Wayne County Deputy Chief Medical Examiner Carl Schmidt

Wayne County Deputy Chief Medical Examiner Carl Schmidt testified that he supervised the autopsy on the body of Lisa Kindred, a 35-year-old white female (Jury Trial Transcript, 05/31/00, 48). Another doctor, Dr. Hlavaty, who was already a pathologist, but in training, actually performed the autopsy (48-49).

The deceased had a single gunshot wound to her left breast (51). There were, however, several irregular wounds around the gunshot entrance wound caused by the fragmentation of an intermediate object (51). The bullet wound and intermediate wounds were consistent with the gun being fired outside of a car that the deceased had been inside of (52). The fragments of the bullet were recovered from the deceased's chest and turned over to the police (53).

Verlin Miller

Verlin Miller testified that he had known Lisa Kindred (Jury Trial Transcript, 05/31/00, 57). She had been his fiance's brother's wife (57).

On May 9, 1999, he was living with his fiancé on Bewick Street in Detroit (57). Sometime after midnight, his fiance's brother, Willim Kindred, came over to his and his fiance's house with his family (57). He had not been expecting William (57). When William came over, he had a conversation with William about William purchasing a motorcycle that he (the witness) owned (57). This conversation took place in his home, in the front room (58). Lisa was not present for this conversation (58). Rather, she was outside waiting in the van (58). There came a point when Lisa did come up to the house and knock on the door to tell William that she was ready to go home because the kids were sleepy and it was late (58). Lisa then went back to the van because the kids were in the van (58). William did not leave right then, however, but stayed another 10 or 15 minutes (58). After he and William were done with their conversation, he walked William to the front door (58).

As he and William were approaching the front door, he heard a sound like a car door slamming (58). He looked out his front door and saw the van speeding off (58). William took off after the van, and because he (the witness) was not fully-dressed, he got dressed and jumped in his truck and took off down the block, to see if he could see where William or the van went (59). It was dark out, and he could not see anybody (59). He eventually made his way to the corner of Cadillac and East Warren, where a Sunoco gas station was (59). It was here that he saw the van (59). The van was still running, and Lisa was lying on the ground next to the van (59). There was glass in front of the door (59). He jumped out his truck and tried to approach Lisa, but by then, a police officer had arrived and told him not to touch Lisa until a detective arrived (59-60). He explained to the police officer that he was Lisa's "brother-in-law," and that she had just left his house (60). The

police officer would still not let him to get close to Lisa, so he called his fiance's mother (60). His fiance's mother lived right next door to them (60). He then went back to his house (60).

When he got back to his house, he noticed a "puddle" of glass across the street from his house, where the van had been parked (60).

On cross-examination, the witness testified that it was after he heard the sound of a car door slamming, and after William got the screen door open, which had been locked, that he heard the squealing of tires (61-62). He looked out and saw one person running through the field that was adjacent to his house (62). The man was 150 to 180 lbs. and did not look too tall, about 6' tall (62-63). He remembered that the man was wearing dark jogging pants which had a white stripe going down the side, and white gym shoes (62). He only saw the back of the person, and the person was around 50 feet away when he saw him (64).

Antonio Burnette

Antonio Burnette testified that he knew Scott from Hurlbut Street (Jury Trial Transcript, 05/31/00, 83-84). He also knew Justly Johnson from the same street (84). They were both friends of his (84). He knew them by the nicknames "Snoopy" (Scott) and "Stank" (Johnson) (84-85).

He saw both Defendant and Johnson on May 8 (84). He was at Scott's house when he saw Scott and Johnson on May 8, at around 10:30 p.m. (85-86). He had a conversation with both of them at that time (86). Scott and Johnson talked about how they were going to "hit a lick," meaning to rob somebody, that same day (86). They asked him to come along, but he told them that he had to meet with his daddy (86). He then left to meet with his daddy (86). He was with his daddy until around 2:00 a.m. (86-87).

He saw Scott and Johnson again when he got back from being with his daddy (87). This was again at Scott's house (87). At that time, Scott told him that they had shot a lady (87-88). Scott told him that they shot the lady because the lady would not come out with any money (88). Johnson told him that Scott (Snoopy) had shot the lady (88). He and Scott and Johnson were drinking and smoking weed at the time that they were having this conversation (88). This did not cloud his memory of the conversation, however (88). After Scott told him that the lady got shot because she would not come out with the money, Scott also said that there was this bitch named Lisa, and that he was going to kidnap her (89). Scott also told him that he was going to start doing stuff at night (89). Johnson told him that he and Scott had had an AK and a rifle (89-90).

After his conversation with Scott and Johnson ended, at around 3:00 or 4:00 a.m., Johnson's girlfriend came and picked him (Johnson) up, and they left (90). Scott went in the house, and he (the witness) got in Scott's car and fell asleep (90).

While he was sleeping in Scott's car, the police came and woke him up and made him get out of Scott's car (92-93). They made him lie on the ground with his legs spread apart, and then they put handcuffs on him and put him in the police car, and took him to 1300 Beaubien (93). The police asked him whether he knew anything about a shooting (93). He told them that he did, and he made a statement about what he knew, which the police wrote out (93). He read the statement over and signed it (93-94). What he had said in the statement was the truth (94). The police had told him that he was under suspicion, and they had advised him of his constitutional rights (94). He gave his statement at around 2:30 p.m. on May 9 (94). The police did not threaten him or promise him anything to get him to tell what he knew (95).

Scott and Johnson had told him that the shooting had first occurred in the 1300 block of Bewick, and then at Cadillac and Warren (94).

On cross-examination, the witness testified that when Scott and Johnson approached him on May 9 about hitting a lick, that was the first time that this ever came up in a conversation between him and these people (142). He was 14 when Scott and Johnson approached him about hitting a lick (143). He was now 15 years old (143). At that time, he was living with his father on Birwood Street, which was a few houses away from where Scott lived (143).

He reiterated that Scott told him that he shot somebody (143). He also reiterated that Scott talked about kidnapping somebody, that somebody being somebody named Lisa (144). Scott said that he wanted to kidnap Lisa (144). This conversation occurred at Scott's house, at about 2:30 a.m., which would have been after the lady was shot (144-146).

The witness reiterated that he encountered the police while he was sleeping in Scott's car (151). The police did not tell him at that time that they believed that he had been involved in the shooting, but they took him downtown anyway (152). At the police station, the police told him that he was a suspect in the shooting that had occurred on Bewick Street (153). They did not tell him, however, that he better tell them something or else he was would be charged with the shooting (153). The police never told him that they believed that it was he who shot the lady (154). After being refreshed with his preliminary examination testimony, however, the witness acknowledged having testified at the preliminary examination that the police did tell him they thought that he had shot the lady (155). He told the police that Scott (Snoopy) and Johnson (Stank) did it (154), which was what he testified to at the preliminary examination (155). And he acknowledged having testified

at the preliminary examination that the police told him that if he did not tell them that it was Snoopy and Stank, they were going to charge him (156).

On redirect, the witness was shown his preliminary examination testimony, and acknowledged that when asked by one of the defense attorneys if the police told him that he better tell who shot the lady or he would be charged with shooting the lady, his response was "no" (158). The witness testified that the police never threatened to charge him with the shooting if he did not name somebody (158).

Detroit Police Officer Frank Scola

Detroit Police Officer Frank Scola testified that he was on duty with his partner, Officer Willie Soles, on the midnight shift on May 9, 1999 (Jury Trial Transcript, 05/31/00, 1010-102).

While they were on duty, they received a dispatch directing them to the Marathon Gas Station at Cadillac and Warren (102). They were the first police vehicle to arrive (102). Upon their arrival, he got out of their police vehicle and observed the victim lying face down on the ground, not breathing, and bleeding from the left side of her chest (102; 104). The victim was in the vicinity of a white minivan, which had its driver's side window busted out (103). The window appeared to have been shot out (103). Inside the car, he saw what appeared to be a bullet hole in the driver's side seat (103). There were also some children in the car, but he did not recall how many (104). He called for an EMS unit and he and his partner waited there for it to arrive (104). They also preserved the scene because this appeared to be a homicide (104). This meant keeping the immediate area clear (104).

There were family members that showed up later, but he would not allow them to get close (104-105). He and his partner waited there for the evidence technicians and Homicide Unit personnel to arrive (105).

While his partner kept the scene at the gas station secure, he and one of his sergeants went over to Bewick Street (106). He was told by his sergeant to accompany him (his sergeant) there (106). Over on Bewick, he saw Scott, who he identified in court, and another person, Raymond Jackson (107). He talked to both individuals there (108). Scott told him that he saw somebody shooting at the victim (109). He took both Scott and Jackson downtown to make witness statements (109).

Also while he was on Bewick, he observed glass fragmentation on the street (109). The glass was in the street, and it appeared to be consistent with damage to a car window (109-110).

On cross-examination, the witness testified that his memory of what Jackson and Scott told him was that they both observed a black male shooting at the victim (111). He first saw Scott and Jackson as they were walking towards Bewick from an alley just west of Bewick (112). He approached them to ask them questions (112). They both volunteered that they saw a shooting (112).

On redirect, the witness testified that he subsequently learned that the victim's name was Lisa Kindred (114).

Raymond Jackson

Raymond Jackson testified that he knew Scott (Jury Trial Transcript, 05/31/00, 115). Scott was one of his friends from the neighborhood, the neighborhood being the area encompassing Bewick and Hurlbut, which was near Cadillac and Warren (115). He had known Scott for about

six years (116). He also knew Justly Johnson, who he had known for 12 or 13 years (116). His brother and Johnson were best friends, which was how he came to know Johnson (116). Johnson had a nickname: Stank, and Scott also had a nickname: Snooky (116-117).

In the late evening/early morning hours of May 8/9, 1999, he was asleep at his grandmother's house (117). He heard something unusual outside, which sounded like a pop and then a car skidding away (117). His grandmother came and got him up and asked him to check why the gate by the house was rattling (118). He put his clothes on, because he was just in his underwear, and went outside (118).

When he got outside, he saw a police car parked by the field next to his house (118). The field was across the street from a house on Bewick, where Lillie Harris and a Mr. Miller lived (119). Next door to where Lillie Harris lived, Lillie Harris's mother lived (119). As he was outside, he looked down the street and saw Scott on his girlfriend Faylynn's porch (120). He saw Scott hand his girlfriend something (120). He did not know what the something was that Scott handed his girlfriend, but he could see that it was long and there was something dragging behind it, like clothes (121). Once Scott handed his girlfriend this object, the girlfriend went in the house and never came back out that night (121). Scott then came down to where he (the witness) was (121). He and Scott then walked up to the service station to see what was going on there (121). When they got there, he saw the Detroit Police (121). There was a big blue van there with "Detroit Police" on the side (121). He and Defendant then went back to his grandmother's house (121). As he and Scott were walking on Bewick, there were more police cars on Bewick (122). A police officer came up to him and Scott and asked them if they had seen anything (122).

Before that, as he and Scott were walking back from the gas station, Scott had told him that as he was at his girlfriend's house, but outside of her house, he saw two guys with rifles come to the front through the yard next door to his girlfriend's and then turn around and go back to the back (122). Because he saw the two guys with rifles, Scott said that he was scared, and so, he threw a rock at his girlfriend's window to get her to let him into her house (122).

When the police officer came up to him and Scott and asked them if they had seen anything, Scott repeated to the officer what he had told him (123). The police officers asked them to lift their feet (123). He (the witness) was not wearing any shoes, but Scott was (123). Scott's shoes had mud on the bottoms of them (123). The police took both him and Scott downtown to police headquarters (123). He gave a statement at police headquarters (123). He did not say anything about seeing Scott hand his girlfriend an object because he did not think anything of it at the time (123). Nor did he ever ask Scott about the object that he had seen Scott hand his girlfriend (124-125).

The next day, he saw Justly Johnson (Stank) (125). This was after he came back from police headquarters (125). He (the witness) was in his grandmother's house drinking beer, and Johnson came in the side door of the house (125). Johnson wished his (the witness's) grandmother a Happy Mother's Day, because it was Mother's Day that day (125). He and Johnson then sat down and had a conversation (126). Johnson asked him if the TV cameras and newspaper people were still outside (126). He told Johnson that they were (126). He asked Johnson why he wanted to know (126). It was then that Johnson told him that he had hit a lick the night before and that he had fucked up and had to shoot (126-127). He (the witness) knew, when Johnson told him this, that a lady had been shot by the field next to his grandmother's house the night before (127). He asked

Johnson what he was talking about, and Johnson said that he had hit a lick with Defendant (Snooky) (127).

After Johnson told him this, he and Johnson went outside (128). Just then, a police detective pulled up in front of his grandmother's house, and the detective asked him if he knew a person nicknamed Stank (128). Johnson told the detective that he was Stank (128). Johnson was put in the back of the police car and driven away (128).

He (the witness) then went back to police headquarters the next day (128). The police told him that they thought that he was hiding something from them (128). He made a second written statement then, in which he told the police what Stank had told him, and he also told the police about seeing Scott (Snooky) giving his girlfriend a long object (129).

On cross-examination, the witness testified that the long object that he saw Scott hand his girlfriend was stiff (132-133). The girlfriend then took the item into the house and shut her door (134).

Also on cross, the witness testified that he never told any police officer that he himself witnessed a shooting (134). Nor did he tell any police officer that he had seen somebody with a weapon (134-135).

Defense

The defense called no witnesses.

Evidentiary Hearing on Remand

The evidence and testimony at the evidentiary hearing on remand from this Court included the following:

Antonio Burnette

Antonio Burnette testified that he knew Defendants Justly Johnson and Kendrick Scott ("Motion" Transcript, 04/08/15, 8). He recalled testifying against these two Defendants at their respective trials relative to the murder of a woman on a particular night, that being May 9, 1999, in his neighborhood (8-9). He did not witness the murder himself, nor was he at the scene of the murder (9). At the time of the murder, he knew both Defendants, in that he hung around with them (9).

The testimony that he gave against the two Defendants was not true (10). Neither of them ever confessed to him of robbing or shooting the woman who got killed on the night in question (10). Nor did he ever see Defendant carrying a gun that night or the day after (10).

The reason that he gave false testimony against the two Defendants was because the police had caught him with an ounce of weed, and they gave him some paperwork to sign, and his being a minor at the time, and not knowing what was going on, he signed it (10). He was afraid of the police, and thought that he would be charged with the murder (10). The police actually told him that he would be charged with the murder if he did not testify against the Defendants (11).

At the time of the murder, at around 12:00 a.m. or 1:00 a.m., on May 9, 199, he was with Johnson, who he referred to as "Stank" (11). They were hanging out on Mount Elliot and Vincent, at his cousin's house, and they left there and went to the home of another of his cousins (11). He was not on Bewick Street at the time of the shooting (12).

Neither of the Defendants threatened him or anyone in his family to testify at the proceeding (12). Nor was he threatened or coerced by anybody else to get him to give the testimony he was giving at this hearing (12). He was currently in prison for fleeing and eluding, but he would be

eligible for parole on April 21 (12). The reason that he was giving the testimony that he was giving now was because by being in prison, he had time to think about the hurt that he had done to other people, and in order to change his life, he had to change the bad that he had done to other people (12).

On cross-examination, the witness was asked if at the preliminary examination of the two Defendants, he had been asked by Scott's attorney if he was afraid of "these men at this time?," to which he responded, "Yes." (13-14). He responded that he did not recall being asked that question, and giving that answer, but after reviewing the preliminary examination transcript, he acknowledged that he was asked that question and did give that answer (14). When asked if it were true that he was afraid of the two Defendants at that time, the witness responded that that was what the police wanted him to say, that is, the police told him that if Scott's attorney asked him if he was afraid of the two Defendants, he was to say that he was (14-15).

The witness was then asked if at Scott's trial, he was asked the following questions, and gave the following responses:

Q When the police were questioning you, did they threaten you to get you to tell what you knew?

A No.

Q Did they promise you anything to get you to tell them what you knew?

A No.

Q They advised you of your rights, however?

A Yes.

Q You're aware that you were under some suspicion?

A Yes.

Q Have you had any threats by anyone at all in connection with your telling the police and testifying?

A Yes.

Q From who?

A From the guys that be around the neighborhood. They come back and tell me things.

(15-16).

The witness testified that he recalled this testimony, but it did not change the fact that the police gave him a piece of paper and told him what to say and how to say it (16). When asked if, when the attorney asked him at Scott's trial if he had been threatened by the police and he said, "No," that was a lie, the witness responded that it was (16). And it was also a lie when the attorney asked him if he had been promised anything to get him to tell what he knew, and he responded, 'No."

On examination by the trial court, the witness was asked why he should be believed now when he was sworn to tell the truth at the trial of the two Defendants, and is now saying that he lied at those two trials (17). The witness acknowledged that he had been sworn to tell the truth at the two trials (17). When asked why his current testimony should be believed as opposed to the testimony that he gave at the trials of the two Defendants, the witness responded that back then, the police had "whooped" on him when he was in custody (17). The witness was asked if it were not true that he did not know the specific questions that he would be asked at trial (18). He responded that the police wrote down a list of questions (18). When the trial court asked the question again,

the witness acknowledged that he did not know the specific questions that he would be asked at the trials (18).

Lameda Thomas

Lameda Thomas testified that she had known Raymond Jackson ("Motion" Transcript, 04/15/15, 34). Jackson was no longer alive, having died August 18, 2008 (35). She had been very close to her cousin (Raymond Jackson), and had known him her whole life (36). She was aware that Jackson had testified against Justly Johnson and Kendrick Scott at their trials (35).

There were two times when Jackson talked to her about his role at the trials: at a birthday party and at a family gathering (35). These two occasions took place in 2002 and 2006 (35). During a general conversation at these gatherings, Jackson said the had messed up and had lied (35). He told her that he lied because he was scared of the prosecutors (36). He never said anything about being scared of Johnson or Scott (36). Jackson and Johnson and Scott had all been close friends (36). When Jackson told her that he had lied, he appeared to be truthful (37).

On cross-examination, the witness testified that she knew that Johnson and Scott had been convicted of this murder (37). When asked what she did to try to correct this, once Jackson told her that he had lied, she responded that she signed an affidavit (37). This was in 2005 (37). When asked what she did with the affidavit, she responded that she kept it and talked it over with her family's lawyer (37). When asked what she was planning on doing with the affidavit, the witness responded that she was going to keep it so that she could help Johnson and Scott out if they needed it (38). When asked why she did not try to help them out when her cousin told her that he lied in 2002, the witness responded that she was too young then (38). She was only 17 years old and in high school (38).

On examination by the trial court, the witness was asked if Jackson told her that everything that he testified to was a lie (39). She responded, "Yes, I do believe in the whole that it was all a lie" (39).

On recross examination, the witness was asked if her cousin ever told her that when he was on the 9th floor of police headquarters that Johnson walked by his cell and said, "I'm going to fuck you up and I'm not going to sweat it" (39-40).[1] She responded that Jackson never told her that (40). When asked if it would surprise her that Jackson testified to that effect at Johnson's trial, the witness responded that it would surprise because her whole family was there when Jackson testified (40). She was asked the question again, and this time, she responded that it would not surprise her that Jackson testified to that effect at Johnson's trial, because Johnson was Jackson's friend (40). When asked if Jackson testified to this effect under oath, the witness surmised that perhaps Jackson was intimidated to say that by the police or by the prosecutor (41).

Charmous Skinner, Jr.

Charmous Skinner, Jr. testified that he went by the nickname CJ ("Motion Transcript, 05/15/15, 6). He testified that his birth date was September 24, 1990 (7). His parents were Charmous Skinner and Lisa Kindred (7). He had lived in Michigan from the time he was three years old until his mother was murdered (7). He was eight years old when his mother was murdered (7).

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[1] Jackson had testified at Johnson's trial that at some point he got locked up on the 9th floor of police headquarters (Waiver Trial Transcript, 01/11/00, 79). Johnson and Snookie (Scott) were also on that floor (79). Snookie kept hollering out something all night that caused him distress (80). There was also a time when Johnson walked by his cell and stopped, pointed his finger into his cell, and said, "I ain't going to believe the hype; I will get you." (81-82). Johnson also said that whatever he (Jackson) told the police, he (Johnson) was going to fuck him up (83).

At the time that his mother was murdered, he was living with his mother, her husband Will Kindred, his little sister, and his little brother (7). He had a close relationship with his mother (8).

He recalled the day that his mother died (8). It was May 9, 1999, Mother's Day, in the early morning (8-9). He was with her when she died (8). She died at the gas station (9). His mother was killed in the car (9). He was in the front seat (9).

Earlier that evening, they had all gone to a drive-in movie (9). After the drive-in movie, they went to Will's family's house (9-10). He had been to this neighborhood before (9). His mother drove (9). When they got there, Will got out of the car and went into the house by himself (10). He was in the backseat at the time (10). Once Will got out of the car, he moved up to the front seat (10). He, his mother, and his siblings then waited in the car (10). His mother appeared to be agitated as they waited for Will (10-11). His mother was huffing and puffing under breath, and swearing a little bit (11). His mother did not stay in the car the whole time (11). She got out of the car and went up to the house that Will had gone into (11). She knocked on the door, and, after a brief "altercation," she returned to the car (11).

It was when his mother got to the door of their car and opened it that he saw somebody (12). This somebody was an African-American man in his mid-30s, short, with short hair, a big beard, and a "big ass" nose (12-13). There was no light in the area except from the light from the car, that being the light that comes on when the car door is open (13). The man was behind his mother, not directly, but off to the side (113). He (the witness) was sitting in the front passenger seat when he observed this (13). He saw nobody else in the street but this man (13).

As the man approached his mother, he (the witness) heard a gunshot (14). When the gunshot went off, the side front window of the car broke (14). He did not hear anything said between the

man and his mother before he heard the gunshot (14). He did not see the man take anything from his mother or the car (14). After the gunshot went off, his mother got in the car and sped off to the nearest gas station (15). When they got to the gas station, his mother went to the back of the car, got a bag of ice from the cooler that they had taken to the drive-in movie, and then she got out of the car, "fell out," and died (15). He did not know at the time that his mother got back in the car that she had been shot (15). By that time, he was not thinking anything, but was just crying (15). He recalled an ambulance arriving (15).

The next morning, Will's mother told him that his mother had died (15-16). He recalled going to the funeral some time after, and presenting his mother with a Mother's Day card (16). He never was interviewed by any police officers or lawyers (16). After the funeral, he stayed with Will for about a week, and then he moved to Philadelphia to live with his grandmother (16).

While he was still in Michigan after his mother's funeral, he never talked to Will or his family about what he had seen that night (16). Nor did any of them ask him about it (16). Had a police officer asked him, before he left Michigan, to describe what he had seen that night, he would have told the truth (17). And if a police officer had asked him to view a lineup , he would have been able to identify the shooter if the shooter was in the lineup (17).

Once he moved to Philadelphia, where he lived with his grandparents and his sister, he saw his biological father (17). When asked if any of these people talked to him about his mother's death, the witness responded that they tried to, but he did not want to talk about it (17). He recalled them taking him to a counselor to talk about his mother, but he did not give the counselor any details about what he saw that night (18). The reason that he did not want to talk about it was that he was trying

to forget it (18). In the years following his mother's death, he never thought the police needed his account in order to solve the case (18). He thought the police had it all figured out (18).

Eventually, he got a letter from a reporter, Scott Lewis (18). This was around August 31, 2011 (18-19). He responded to Lewis's letter, telling Lewis that he would help if need be, if the dude or dudes were in prison for killing his mother and they did not do it, but that if they did do it, he would help in the other direction (19). Also in his letter, he wrote to Lewis that, "I will never forget the person's face, and if it is him, I will testify against him. But if it's not, I would not mind testifying on his behalf" (20). Lewis was the first person to whom he gave a description of the person (20). He was incarcerated in Pennsylvania when he had contact with Scott Lewis (21). He had been incarcerated for two years (21).

He graduated from high school in 2008 (21). In between the time that he graduated from high school and the time that he went to prison, he had been living by himself, selling drugs (21-22). What he was in prison for when Scott Lewis contacted him was perjury (22). The charge of perjury, which he pled guilty to, was for lying on the stand (22). He lied to protect a friend who was charged with a double homicide (22).

After he spoke to Scott Lewis, he was contacted by the Michigan Innocence Clinic (23). This was in late 2011 (23). He first spoke to the people from the Innocence Clinic on the phone, and then, when he met with them in person, he was shown a photo lineup (23). He was shown one photo at a time from the array (24). He did not see the person who approached his mother in the photo array (24). When asked if he recognized Johnson or Scott in court, the witness responded that he did not (25).

On cross-examination, the witness acknowledged that in his affidavit, he did not say that he heard a gunshot (26-27). He stated that he did not think that he needed to put that in his affidavit inasmuch as the glass shattered, and there was a hole in his mother's chest (27). He acknowledged that he did not see a hole in his mother's chest at the time that he witnessed the event (27).

The witness testified that at the time that the glass shattered, his mother was in the process of getting back into the car, and she was halfway in the car (27-28). He reiterated that when he saw the man, the man was behind his mother and a little off to her side (28). He assumed that the bullet came through the window (29). He knew that the man had a gun, but he did not know if the gun was a rifle or a handgun because he did not see that (34). Nor did he know if the man had the gun in his right hand or his left hand (34). When asked how long he had his eyes on the guy from beginning to end, the witness responded, "About 25 seconds," but he acknowledged that he was only guesstimating (34). He knew that the man was there long enough for him to get a good look at him (35). He did not hear the man say anything to his mother (34-35). All of a sudden, the man just shot (35).

The witness testified that it was dark out, but the lighting from the car was good (35). This was because the car door was open, so that the inside dome light was on (35). When asked if that allowed him to see outside of the car, the witness responded, "Yeah, technically speaking, yeah, yeah" (35). He did not remember if his minivan was parked on the right side of the street or the left side (35). He did not see what kind of clothing the man was wearing (36).

The witness testified that when he wrote his response letter to Scott Lewis's letter, he began by saying, "Wow, your letter really surprised me" (36). When asked what it was that surprised him in Lewis's letter to him, the witness responded that it was "they was still trying to find out who killed

my mother" (36). The gist of Lewis's letter then was that "they're still trying to find out who really killed my mother" (36). When asked if that suggested to him that the people who had been convicted of it had been wrongly convicted, the witness responded that Lewis did not suggest that (36). Rather, what suggested that were the papers that he got off of the Internet (36). When asked what papers he was referring to, the witness responded "news articles" (36). These were not, however, news articles that he read before Lewis contacted him (36-37). They were news articles that he actually received from Lewis, authored by Lewis, from which he got the impression that the people who had been convicted for his mother's death had been wrongly convicted (36-38). When asked if his thought process, then, from the get-go, was that the two guys had been wrongly convicted, the witness responded that that was not his thought process from the get-go, but when he read "the stuff," it sounded like the police department had done a bad job (38).

Finally, the witness reiterated that had the police interviewed him, he would have given them a statement (38). But he acknowledged that this was so even though afterwards, six months later, he did not want to to talk to anybody about it (38). So, the difference was the time frame (39). Had the police interviewed him on the night of the incident, he would have talked to them, but after the funeral he did not want to talk to anybody (39).

On examination by the trial court, the witness was asked if his mother and Will Kindred were getting along okay in the van when they were at the drive-in movie (47). He responded, "Yeah. I mean, yeah, I guess" (47). When asked what grade he would have been in at the time, the witness responded that he did not know (47). Nor did he know what school he went to at that time (48). When asked if he remembered the name of his teacher, the witness responded, "If I don't know the school I went to, how would I know the name of my teacher?" (48). When asked what kind of

grades he got back then, the witness responded that he always got good grades, so he would assume that his grades were good back then (48-49). When asked what his favorite subject in school was, the witness responded that he had no favorite subject because he did not like school (49).

On further examination by the trial court, the witness testified that it was pitch black outside (52). The trial court asked these questions and got these responses:

> THE COURT: A dome light and a van light shines down on the people that are inside the compartment and doesn't really show anything outside, does it?
>
> THE WITNESS: It does.
>
> THE COURT: Oh, it does?
>
> THE WITNESS: Yeah.
>
> THE COURT: All right. Were there lights outside at the time this incident happened?
>
> THE WITNESS: I don't recall.
>
> THE COURT: Was the porch light on of the house that your mom went to?
>
> THE WITNESS: I don't even think they have a porch. I don't remember a porch.
>
> (54-55).

On further examination by the trial court, the witness was asked these questions and gave these responses:

> THE COURT: It's a van, okay. Now you said that there was a person that was behind her?

THE WITNESS: Yes.

THE COURT: How far behind her was this person?

THE WITNESS: Maybe six inches.

* * * *

THE COURT: And would it be fair to say that your mother was between you and this man that came up behind her?

THE WITNESS: Between me?

THE COURT: Your mother –

THE WITNESS: The car. She was between herself, the car, and the car door. That's what she was between.

THE COURT: Okay, all right. So the door was partially open, and she was inside the door?

THE WITNESS: When she was shot?

THE COURT: Yes.

THE WITNESS: Yes.

THE COURT: Okay. And this other individual, this man that was behind her would have been outside the door, right?

THE WITNESS: Yes.

THE COURT: About how far away from the side of the van would you say he was?

THE WITNESS: Same amount of space.

(57-58).

* * * *

THE COURT: Now your mother and this person who killed her, basically, you never heard them say anything to each other?

THE WITNESS: No.

THE COURT: You said that this person came up behind your mother and there wasn't anything said between them, and the next thing you knew she had been shot and the window shattered to the van, correct?

THE WITNESS: Yes, next thing I knew –

THE COURT: That's all I asked you.

(62-63).

* * * *

THE COURT: Okay. The amount of time that she was outside the van and this person was behind her with nothing being said, how many second went by from the time she got up to the side of the van and the window shattering? Let's put it that way.

THE WITNESS: I don't know, I'm not going to estimate. I don't know.

THE COURT: Like real quick?

THE WITNESS: Long enough for me to see his face.

THE COURT: That's not what I asked you.

THE WITNESS: I'm saying you asked me how long.

THE COURT: That's not what I'm asking you.

THE WITNESS: How long do you need to recognize somebody?

THE COURT: That's not what I asked you. I'm asking you for a time.

THE WITNESS: I don't know.

(63-64)

* * * *

THE COURT: I imagine you must have found it pretty interesting to be contacted by Mr. Lewis concerning this?

THE WITNESS: Yes.

THE COURT: Had anyone else ever contacted you concerning the defendants in this case, Justly Johnson or Mr. Kendrick Scott?

THE WITNESS: Yes.

THE COURT: Concerning their involvement or noninvolvement in this incident?

THE WITNESS: Yes.

THE COURT: Who else?

THE WITNESS: Wisconsin people.

THE COURT: The people in Wisconsin?

THE WITNESS: Yes.

THE COURT: At the University of Wisconsin Innocence Project?

THE WITNESS: Yes.

(69-70).

* * * *

THE COURT: When the people from the University of Wisconsin Innocence Project spoke with you, did they show you any photo array?

THE WITNESS: No, I spoke with them on the phone one time –

THE COURT: That's all?

THE WITNESS: – and that was that.

THE COURT: And at the time the window broke on the van in which you were situated when your mother was shot, you can't tell us as to whether she was shot by either a handgun or a rifle?

THE WITNESS: No.

THE COURT: How many shots did you hear?

THE WITNESS: One.

THE COURT: One? And did you see a flash or muzzle flash from the gun?

THE WITNESS: No.

(71).

Curtis Williams

Curtis Williams testified that he was a practicing criminal defense attorney in 1999 and 2000 ("Motion" Transcript, 05/15/15, 77). He testified that he was appointed to represent Kendrick Scott for an offense that occurred in May of 1999 (77). He testified that he had the police reports in this case (77). He was aware that there had been children in the vehicle in which the victim was killed, but he did not recall there being any police reports of any interviews with any of the children (78). He himself did not interview any of the children (78). Had he known that one of the children was 7 or 8 years old, he would have tried to interview that child 978). And had that child told him in such an interview that he had witnessed the incident, and that the perpetrator did not resemble Scott,

that would have been helpful to his defense of Scott (78). Presenting this child as a witness, if the child was going to say that Scott did not resemble the shooter, would not have been inconsistent with his defense (79). That is, he was not making a defense of self-defense (79). Likewise, it would have been helpful to his defense if the child was going to testify that the shooter did not resemble Justly Johnson either (80).

The witness was asked if he had had any information or documents regarding domestic violence on the part of Will Kindred (80). He responded that he did not recall ever having had any such information (80). He testified that had he had such information, he would have looked into the issue and perhaps used it for impeachment either at trial or at the preliminary examination (82).

He recalled that there were two primary witnesses against Scott at his trial: Antonio Burnett and Raymond Jackson (83-84). He was asked if he had any reason to believe that either of these two witnesses would recant their testimony at trial (84). He responded that he did not (84). If they had, that would have been helpful to his defense (84-85).

On cross-examination, the witness was asked if he had any evidence or was aware of any evidence that Will Kindred had been involved in the murder of his wife (86). The witness responded that he did not (86).

On examination by the trial court, the witness was asked if he had held out to the jury in Scott's case the possibility that Will Kindred had had something to do with is wife's murder, he would have put himself in a terrible light with the jury (87). The witness responded the if had nothing to support such a theory, he would have out himself in a horrible light with the jury (87).

Argument

I. The trial court did not abuse its discretion in denying Scott's motion for new trial based on newly discovered evidence due to its finding that the testimony of the victim's son was neither credible nor veracious.

A) Scott's Claim

Scott claims that the trial court abused its discretion in denying his motion for new trial on the basis of the *Cress* test for newly discovered evidence, where the victim's son, CJ Skinner, Jr, testified that neither Scott nor Johnson was the perpetrator.

B) Counterstatement of Standard of Review

This Court reviews a trial court's decision to grant or deny a motion for new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). A mere difference in judicial opinion does not establish an abuse of discretion. *Id*. A trial court's factual findings are reviewed for clear error. *Id*.

B) The People's Response

To warrant a new trial based on newly discovered evidence, a defendant must make the following showings

> 1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial.
>
> *Cress*, 468 Mich at 692.

The People submit that the *Cress* factor that is truly at issue here is whether the trial court abused its discretion in finding that Skinner's testimony would not make a different result probable on retrial. In so finding, the trial court obviously found that Skinner's testimony was not credible. And what is clear is that a reviewing court should not substitute its own opinion of credibility for that of the trial court as a recent Order of this Court in *People v Tyner*, 497 Mich 1001; 861 NW2d 622 (2015), indicates. That is, of course, because the trial court is in a superior position to assess the credibility and veracity of witnesses.

Scott is basing his claim primarily on the testimony of Charmous Skinner, Jr. Before discussing Skinner's testimony, however, the People should like to address the testimony that convicted Scott, and for that matter, Johnson. Both Antonio Burnette and Raymond Jackson gave testimony that was consistent at both trials, that is, the trial of Scott and the trial of Johnson. And the testimony was unwavering even in the face of attempts at intimidation and pressure. Indeed, at the preliminary examination of both Scott and Johnson, the attempt at intimidation by Scott and Johnson was apparent enough to cause the examining magistrate to comment on it:

> THE COURT: He's [referring to Antonio Burnette] looking down to keep from looking at your clients that keep looking at him and touching their face. I don't know if it's a threat, or sign language within the community, or what.
>
> DEFENDANT SCOTT: I wasn't doing nothin.'
>
> THE COURT: Oh, you did like this and you did like this.
>
> DEFENDANT SCOTT: I have a nervous problem.

THE COURT: And like this and like that. And the one named Stank, he did like this, goes like this, glaring at him. I don't know what those looks in the neighborhood mean. It's just like I don't know what lick means.

Sir, keep your hand down.

(Preliminary Examination Transcript, 05/26/99, 43-44).

* * * *

THE COURT: Well, I'm watching his (referring to Antonio Burnett] demeanor and it seems like he's scared to death of these two young men that you are representing.

MR WILLIAMS [Counsel for Scott]: That may be true, your Honor. That may be the Court's interpretation. Maybe he's not afraid of these guys.

BY MR WILLIAMS:

Q Are you afraid of these men at this time?

A Yes.

Q You are?

MR. WILLIAMS: Terrible answer, your Honor.

MR. FURTAW [Assistant prosecutor]: Well –

THE COURT: Well, I've been sitting here awhile and I've seen a number of cases, and I can usually call it pretty good.

(Preliminary Examination Transcript, 05/26/99, 61).

And, as far as Raymond Jackson, this witness stuck to his story even though Scott and Johnson tried to intimidate him while the three of them were in police custody.[2] The People simply do not see Johnson's and Scott's attempts at intimidation as being consistent with innocence.

Maybe Antonio Burnette and Raymond Jackson were messed up about times, but Burnette was consistent in his testimony about what Johnson and Scott told him, and Jackson was consistent in his testimony about what Johnson told him. And a fact that corroborates Burnette's testimony is that a spent .22 caliber long Winchester Super X fired cartridge casing was found in front of 4470 Bewick (Waiver Trial Transcript, 01/11/00, 81), and Burnette testified the he saw Scott and Johnson with an AK-47 and a .22 rifle (Waiver Trial Transcript, 01/11/00, 30; 60-61).

As to Scott's claim of innocence that is based primarily on the testimony of Charmous Skinner, Jr., the People would first note that whether the trial court found Skinner to be credible is the linchpin inquiry.

The People believe that there are a number of reasons why Skinner's testimony should not be believed.

First, a seed was planted in Skinner's mind, if not in 2007 when the Wisconsin Innocence Project contacted him and asked him if he witnessed the shooting, then by way of Scott Lewis's letter to him and the articles that Skinner said that Lewis gave to him, that the person or persons who

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[2] As noted previously, Jackson testified at Johnson's trial that at some point he got locked up on the 9th floor of police headquarters (Waiver Trial Transcript, 01/11/00, 79). Johnson and Snookie (Scott) were also on that floor (79). Snookie kept hollering out something all night that caused him distress (80). There was also a time when Johnson walked by his cell and stopped, pointed his finger into his cell, and said, "I ain't going to believe the hype; I will get you." (81-82). Johnson also said that whatever he (Jackson) told the police, he (Johnson) was going to fuck him up (83).

had been convicted of his mother's murder had been wrongly convicted. That would then explain why he would not pick anybody out of the photo array. He could certainly surmise that the photographs of the "wrongly convicted" persons would be in the photo array. This would also explain why Skinner did not seem to want to answer the trial court's question about how long the episode took. Skinner's response, as if reading from a script, was that it took long enough for him to see the face of the shooter, and when told that that was not the question, Skinner persisted in not answering the question, until finally he relented and just said that he did not know. Furthermore, and one would have had to have been at the evidentiary hearing, the whole tenor of Skinner's demeanor on the People's cross-examination of him, and certainly the trial court's examination of him, was of impatience and evasiveness, if not downright impertinence.

Second, the picture that Skinner drew at the evidentiary hearing when he testified was a before and after picture. The before picture that he drew shows his mother standing outside of the van in front of the man and slightly off to his right, and the after picture shows her halfway into the van, with the van door open, and the door separating his mother from the man. It is hard to fathom how, if this was the scenario, why the man would let the victim get into the van at all.

Finally, the trial court, in questioning Skinner, made a point or at least suggested that sitting in the passenger set with the dome light of the van on against a dark outside background would have made it, if not impossible, very difficult to see anything out in the dark.[3]

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[3] The People are cognizant that Johnson and Scott have attached three cases where the courts in those cases found it reasonable that a car's dome light could illuminate somebody outside of the car. The People submit that those cases are distinguishable in that the identifier of the person standing outside of the car was not inside the car with the light shining down into the inner compartment of the car, as Skinner was. In *Tyner*, the identifier was in a different vehicle when he said that he viewed Tyner by way of the dome light of the vehicle that Tyner was in (the Opinion does not say whether the person the identifier identified as Tyner was inside or outside

Rather than simply regurgitating what else the trial court said and found relative to Skinner's testimony, for this Court can read that for itself, the People will simply state that none of the findings made by the trial court, with the exception of its finding that Skinner would have slept through the movie at the drive-in theater, which was speculative, were clearly erroneous. Certainly, the trial court's finding that Skinner's previous conviction for perjury in a murder case was indicative of his lack of veracity, that is his disposition to tell the truth, was not clearly erroneous. Nor was the court's finding that Skinner's mother would have blocked Skinner's view of the perpetrator clearly erroneous. Nor was the trial court's finding that Skinner would not remember with any type of detail the perpetrator's face after 16 years.

There is an added feature that is unique to Scott that the People would ask this Court to also consider.

In the pleading filed with the trial court on behalf of Scott, entitled, "Defendants' Response to Prosecution's Pre-Hearing Briefs," Scott attached the affidavit of Lakenya Hicks, in which Hicks stated that she was at the home of her boyfriend Quintin Billingslea, along with Kendrick Scott on the night that the victim was killed in his case. She avers that all three of them were in the house when she heard a gunshot fired nearby outside. (This affidavit is attached as **Appendix A**). In Scott's pleading, he wrote relative to this affidavit:

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of the vehicle). In *Seals v Rivard*, the identifier was either in the driver's seat of his car or outside of the car when he said that he saw by way of his dome light the two robbers standing outside of his car. There would be a difference, the People assert, between sitting in the driver's seat and looking out because the dome light would be shining behind the identifier, and sitting in the passenger seat and having to look through the dome light out into the dark. And finally, in *Caldwell v Lafler*, the identifier was standing *outside* of his vehicle getting robbed and he was able to see the robber by way of his dome light.

> Furthermore, the defense intends to present as a witness at the hearing Lakenya Hicks, who will testify that she was with Mr. Scott inside a house when they both heard the gunshot that killed Ms. Kindred. Ms. Hicks's account supports the materiality of the newly discovered evidence because it established that Mr. Scott could not have been the man that shot the victim.

MCR 2.114(D) provides that an attorney's signature on a court pleading certifies the attorney's belief that the pleading is "well grounded in fact." And defendants are generally bound by the statements of their attorneys. *United States v Bentson*, 947 F2d 1353, 1356 (CA 9, 1991), *cert den* 504 US 958; 112 S Ct 2310; 119 L Ed 2d 230 (1992); see also *People v Von Everett*, 156 Mich App 615, 624; 402 NW2d 773 (1986), and *People v McCray*, 245 Mich App 631, 635-637; 630 NW2d 633 (2001), *lv den* 466 Mich 873; 645 NW2d 666 (2002).

The affidavit executed by Lakenya Hicks, and adopted by Scott by way of what his present counsel said in the pleading filed on his behalf in the trial court conflicts with a number of statements Scott made to the contrary.

First, in Judge Edwards's Opinion denying Justly Johnson's second Motion for Relief from Judgment, Judge Edwards notes that attached to Johnson's Motion was an affidavit from Kendrick Scott, in which Scott, according to Judge Edwards, avers that "he saw the other two men who committed the crimes of which defendant [Johnson] was convicted *immediately* before they occurred." (**Appendix B**, pp 3-4).[4]

[4] The People do not have a copy of Scott's affidavit that was attached to Johnson's second Motion for Relief from Judgment, but it should, it would seem, be in the court file.

At Scott's trial, Lillie Harris testified that she knew who Scott was, although she did not know him personally. She had seen him before in her old neighborhood, on Bewick. She only knew him by the nickname "Snook" or "Snoop".

As her fiancé was driving around in his truck looking for Lisa, he called her and told her that he thought that something had happened to Lisa. Her fiancé sounded all frantic, and he was rambling. She threw on some clothes and went outside and starting looking around. She looked up and down the street and in the alley, and then, she started to go over to her mother's house, because she heard the front door of her mother's house opening.

Just then, she saw a car coming down the street. The car pulled up slowly, and, not being familiar with the car, and not knowing who it was, she backed up. She then heard somebody call out her nickname, "Peggy." She looked in the car, and saw that it was Scott and another guy. She had never spoken to Scott before. Scott asked her if she had seen two guys run by there with a shotgun. Scott then told her and her mother, who had by that time come out of her house, that he had seen two guys shoot a girl who had been sitting in a white van.

Also at Scott's trial, Detroit Police Officer Frank Scola testified that he was on duty with his partner, Officer Willie Soles, on the midnight shift on May 9, 1999. While they were on duty, they received a dispatch directing them to the Marathon Gas Station at Cadillac and Warren. They were the first police vehicle to arrive. Upon their arrival, he got out of their police vehicle and observed the victim lying face down on the ground, not breathing, and bleeding from the left side of her chest. The victim was in the vicinity of a white minivan, which had its driver's side window busted out. The window appeared to have been shot out. Inside the car, he saw what appeared to be a bullet hole in the driver's side seat. There were also some children in the car, but he did not recall how

many. He called for an EMS unit and he and his partner waited there for it to arrive. They also preserved the scene because this appeared to be a homicide. This meant keeping the immediate area clear.

There were family members that showed up later, but he would not allow them to get close. He and his partner waited there for the evidence technicians and Homicide Unit personnel to arrive.

While his partner kept the scene at the gas station secure, he and one of his sergeants went over to Bewick Street. He was told by his sergeant to accompany him (his sergeant) there. Over on Bewick, he saw Scott, who he identified in court, and another person, Raymond Jackson. He talked to both individuals there. Scott told him that he saw somebody shooting at the victim.

If Scott saw the shooters immediately before the victim was shot, it seems obvious that he was not in a house with Hicks and her boyfriend when they heard the shot that killed the victim. Likewise, if Scott saw two guys shoot a woman in a white van, as he told Lillie Harris, then he was not in a house with Hicks and her boyfriend when they heard the shot that killed the victim. If Scott saw somebody shooting at the victim, as he told Officer Scola, then he was not in a house with Hicks and her boyfriend when they heard the shot that killed the victim. The point is not that any of Scott's various statements should be believed, or that Hick's affidavit, which Scott has adopted, should be believed, the point is that Scott cannot seem to get his story straight.

As far as the "evidence" of domestic abuse being newly discovered, Scott does not explain why it could not have been discovered for trial using reasonable diligence.

II. When an appellate court remands a case with specific instructions, it is improper for a lower court to exceed the scope of that order. According to this Court's Remand Order, the trial court was to limit itself to a consideration of Charmous Skinner's proposed testimony, that the murderer of his mother was a person other than Kendrick Scott or Justly Johnson, and whether such testimony, either under an ineffective assistance of counsel theory or a newly discovered evidence theory, warranted a new trial; the trial court was not directed by the Remand Order to give an opinion about the type of murder involved or the motive for the murder. But the trial court also did do what it was directed by this Court's Remand Order to do, that is, to again, determine whether the testimony of Charmous Skinner either under an ineffective assistance of counsel theory or a newly discovered evidence theory, warranted a new trial, and the trial court did not find Skinner to be a credible witness as far as his testimony that he saw the murderer and that it was neither Scott nor Johnson. Reversal of the trial court's Order denying Scott's Motion for Relief from Judgment is not warranted.

A) Scott's Claim

Scott makes three (3) claims: (1) that, at trial, robbery was the only theory presented, and thus, it was necessary to securing Scott's felony murder conviction; (2) that, as Judge Callahan found, the newly discovered evidence convincingly discredited the robbery theory that the prosecution relied on at trial to meet the critical enumerated felony requirement of felony murder; and (3) that being convinced that the evidence at the hearing entirely defeated the robbery theory, Judge Callahan plainly abused his discretion in denying Scott's Motion for Relief from Judgment.

B) Counterstatement of Standard of Review

Whether the trial court exceeded the scope of its authority on remand is a question of law, which this Court reviews de novo.

C) The People's Response

i) Claim that showing the commission of the attempt to commit an enumerated underlying felony was necessary to secure Scott's felony murder conviction

The People agree with Scott to the extent that in order to convict Scott of felony murder, the prosecution had to show that the underlying enumerated felony to support the felony murder charge was committed. The charged enumerated underlying felony was not robbery, however, but larceny; that is, the prosecution had to show that the murder was committed during the perpetration of or the attempt to perpetrate a larceny.

ii) Claim that Judge Callahan found that the newly discovered evidence convincingly discredited the robbery theory that the prosecution relied on at trial to meet the critical enumerated felony requirement of felony murder

The People do not dispute that a reading of the trial court's findings on remand from this Court do show that the trial court was of the opinion that the killing of the victim had not been a robbery gone bad (which had been the prosecution's theory at trial) (Motion Transcript, 08/07/15, 14-16).

As can be seen from a reading of this passage, the trial court based its opinion that the murder of Lisa Kindred had not been the result of a robbery gone bad, but instead possibly a murder-for-hire, involving the husband having hired the Defendants, on the Roseville Police reports of domestic abuse. The question, as the People see it, is whether the trial court should have even considered the police reports of domestic abuse at this hearing on remand. Indeed, the People objected to the admission of, and the trial court's consideration of, the police reports on a number of grounds (see Motion Transcript, 04/08/15, 28-30), those being that the admission of, and the trial court's

consideration of, the police reports, were beyond the scope of the Supreme Court's Remand Order, that they were hearsay, and that they were not admissible because they were not relevant.

a) The Roseville Police reports of domestic abuse were beyond the scope of the Supreme Court's Remand Order

This case was on remand from the Court of Appeals, by way of this Court's Order,which stated, in pertinent part:

> [W]e REMAND this case to the Court of Appeals for consideration, as on leave granted, of the following issues: (1) whether trial counsel rendered constitutionally ineffective assistance by failing to call Charmous Skinner, Jr., as a witness at trial; (2) whether the defendant is entitled to a new trial on grounds of newly discovered evidence in light of the proposed evidence related to Charmous Skinner, Jr., as an eyewitness to the homicide; (3) whether appellate counsel rendered constitutionally ineffective assistance by failing to raise these two issues on direct appeal;[5]

As can be seen, the claims regarding the victim's son were the subject matter of the remand from this Court.

b) The Roseville Police reports were hearsay

To potentially effect a different result on retrial and thereby satisfy the fourth *Cress, supra,* 468 Mich at 692, factor, the newly discovered evidence must be admissible. *People v Grissom,* 492 Mich 296, 324; 821 NW2d 50 (2012) (Marilyn Kelly, J. concurring).

Reports prepared by police officers or their affiliates are not admissible under MRE 803(6), the business records exception, or MRE 803(8), the public records exception, because they are adversarial investigatory reports prepared in anticipation of litigation and thus lack the requisite

[5] Charmous Skinner, Jr, is the victim's son.

indicia of trustworthiness. *People v McDaniel*, 469 Mich 409, 413-414; 670 NW2d 659 (2003); *Solomon v Shuell*, 435 Mich 104, 130-133; 457 NW2d 669 (1990).

c) The Roseville Police reports were not relevant

Simply showing a motive for a murder is not enough to make such evidence admissible without there being some nexus between the proffered evidence and the charged crime. See *State v Rabellizsa*, 79 Hawai'i 347; 903 P2d 43, 46-47 (1995), and the cases cited therein.

d) Scott did not show that the Roseville Police reports could not have been discovered for trial using reasonable diligence, in any event.

As far as the "evidence" of domestic abuse being newly discovered, it was never explained why it could not have been discovered for trial using reasonable diligence. Thus, it did not pass the four factor test of *Cress, supra*, which is, that:

> 1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) *the party could not, using reasonable diligence, have discovered and produced the evidence at trial*; and (4) the new evidence makes a different result probable on retrial. (Italics added).

iii) Claim that inasmuch as Judge Callahan was convinced that the evidence at the hearing entirely defeated the robbery theory, he (Judge Callahan) plainly abused his discretion in denying Scott's Motion for Relief from Judgment.

The People will once again set forth what this Court stated in its Remand Order:

> [W]e REMAND this case to the Court of Appeals for consideration, as on leave granted, of the following issues: (1) whether trial counsel rendered constitutionally ineffective assistance by failing to call Charmous Skinner, Jr., as a witness at trial; (2) whether the defendant is entitled to a new trial on grounds of newly discovered evidence in light of the proposed evidence related to Charmous Skinner, Jr., as an

> eyewitness to the homicide; (3) whether appellate counsel rendered constitutionally ineffective assistance by failing to raise these two issues on direct appeal;

It seems rather clear that the trial court was to limit itself to a consideration of Charmous Skinner's proposed testimony, that the murderer of his mother was a person other than Johnson or Kendrick Scott, and whether such testimony, either under an ineffective assistance of counsel theory or a newly discovered evidence theory, warranted a new trial. The trial court was not directed by this Court's Remand Order to give an opinion about the type of murder involved or the motive for the murder. Nor does the trial court, in its findings, allude to anything testified to by Charmous Skinner that would have led to the conclusion that this was a murder-for-hire, as opposed to a robbery gone bad.

When an appellate court remands a case with specific instructions, it is improper for a lower court to exceed the scope of that order. *People v Russell,* 297 Mich App 707, 714; 825 NW2d 623 (2012). That is what happened here, as far as the trial court giving its opinion about what the case was about, or what the motive for the murder was. The trial court was simply not directed to address the motive for the murder, or give an opinion on what type of murder it was. The trial court's musings about what type of murder was involved, or what the motive of the murder was, should be regarded as mere dicta.

Although the trial court did exceed the scope of the Supreme Court's Remand Order when it gave its opinion that this was a murder-for-hire, as opposed to a robbery gone bad, the trial court, nevertheless, also did do what it was directed by the Supreme Court's Remand Order to do, that is determine whether the testimony of Charmous Skinner either under an ineffective assistance of

counsel theory or a newly discovered evidence theory, warranted a new trial. The trial court did not find Skinner to be a credible witness as far as his testimony that he saw the murderer and that it was neither Scott nor Johnson. And the trial court found that Scott's trial counsel, as well as counsel for Johnson, were not ineffective in seeking out Skinner for trial. Thus, the trial court did address, and did arrive at a conclusion, relative to the issues that the Supreme Court directed it to do in its Remand Order.

III. Scott's claims of ineffective assistance of trial and appellate counsel pertaining to the victim's son and evidence of domestic violence should fail.

A) This Court's Inquiry

The Supreme Court's other inquiries, in its Remand Order of November 21, 2014, were (1) whether trial counsel rendered constitutionally ineffective assistance by failing to call Charmous Skinner, Jr., as a witness at trial; and (2) whether appellate counsel rendered constitutionally ineffective assistance by failing to raise these two issues (the newly discovered evidence issue and the ineffective assistance of counsel of trial counsel issue) on direct appeal. Although the Supreme Court's Order mentioned nothing about evidence of domestic violence, the trial court addressed it from the standpoint of the effectiveness of trial counsel.[6]

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[6] Johnson, of course, could not make a claim of ineffective assistance of counsel pertaining to evidence of domestic violence because Johnson, in a third Motion for Relief from Judgment, filed by the Wisconsin Innocence Project in November of 2009, made the allegation that he had new evidence of ineffective assistance of trial counsel for trial counsel's failure to investigate and present evidence of domestic abuse on the apartment of Will Kindred against the victim. In an Opinion and Order, dated February 2, 2010, Judge Edwards rejected that claim. Thereafter, this Court denied Johnson's Application for Leave to Appeal the trial court's denial of his third Motion for Relief from Judgment "for failure to meet the burden of establishing entitlement to relief under MCR 6.508(G)(2) (sic) and MCR 6.508(D)," (Court of Appeals No.

B) The People's Response

In his Affidavit (attached as **People's Appendix C**), the victim's son states that after his mother's death, he shut down and repressed it, and that his family tried to make him talk to a counselor, but he never did talk to any counselor or therapist about his mother death. He gave like testimony at the evidentiary hearing. If the victim's son would not even talk to a counselor or therapist, there seems little likelihood that he would have been willing to talk to a lawyer.

As far as Scott's trial counsel being ineffective in failing to investigate and produce evidence of domestic violence, the trial court observed at the evidentiary hearing, during the testimony of Scott's trial counsel, Curtis Williams, that the jury may well have looked disfavorably on him (trial counsel) had he simply flung out evidence of domestic abuse without connecting Will Kindred to the actual homicide of the victim. Indeed, on examination by the trial court, Williams was asked if he had held out to the jury in Scott's case the possibility that Will Kindred had had something to do with his wife's murder, whether he would have put himself in a terrible light with the jury. Williams responded that if he had had nothing to support such a theory, he would have put himself in a horrible light with the jury.

The trial court's observation was correct. See e.g. *State v Griswold,* 172 Vt 443, 446-447; 782 A2d 1144, 1146-1147 (2001), *and State v Leitner,* 945 SW2d 565, 572-573 (Mo App, 1997) (murder defendant was not entitled to present evidence, including letter, docket sheet, and petition for order of protection, which allegedly indicated that victim's estranged husband may have

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298189), and the Supreme Court denied Johnson's Application for Leave to Appeal "because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D)." (Supreme Court No. 142526).

murdered victim, absent evidence that husband committed act directly connected with crime); and see *Walters v McCormick*, 122 F3d 1172, 1177 (CA 9, 1997), *cert den* 523 US 1060; 118 S Ct 1389; 140 L Ed 2d 648 (1998) (evidence of third-party culpability is not admissible unless it is coupled with substantial evidence tending to directly connect that person with actual commission of offense; exclusion of tangential evidence of something that may have happened at different time and place does not constitute due process violation).

IV. There is no free standing claim of innocence in Michigan jurisprudence, nor should there be; in any event, Scott has not shown entitlement to relief under the stringent burden of proof that other states which had recognized such a claim have applied.

A) Scott's Claim

Scott's final claim is that this Court should grant him relief under a free standing claim of innocence standard.

B) The People's Response

The first problem is that Scott did not raise this claim in the Court of Appeals. Thus, that Court was not given the opportunity to consider such a claim. See e.g. *People v Holloway*, 387 Mich 772 (1972) ("an appellant may not raise in this Court an issue not presented to the Court of Appeals.").

In *Herrera v Collins*, 506 US 390; 113 S Ct 853; 122 L Ed 2d 203 (1993), the United States Supreme Court, in the context of federal habeas review, and although not going so far as to conclusively recognize that a cognizable actual innocence claim exists under the federal constitution, stated: "We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a

defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." *Id*., 506 US at 417; 113 S Ct at 869. More recently, the Supreme Court has reaffirmed that no stand alone actual innocence claim has yet been recognized, explaining: "We have not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence." *McQuiggin v Perkins*, – US –;133 S Ct 1924, 1931; 185 L Ed 2d 1019 (2013). If such a right exists, it seems questionable whether it would apply to Johnson's case because his case is not, in contrast to *Herrera*, a capital case. See *Wright v Stegall*, 247 Fed App'x 709, 711 (CA 6, 2007). Further, *Herrera* also suggested that, when available, the appropriate avenue for relief on actual innocence grounds rests in an application for executive clemency. *Herrera*, 506 US at 414-417; 113 S Ct at 867-869. Because such avenues are available in Michigan, see Const 1963, art 5; § 14; MCL 791.243, it is not clear that the type of actual innocence claim contemplated in *Herrera* would be properly brought before the courts. Johnson has not shown the existence or applicability of a federal freestanding actual innocence claim in this case.

In any event, assuming that such a right exists in Michigan, "the burden placed upon the applicant to prevail in a freestanding-actual-innocence claim should be a 'Herculean task' because, once an applicant 'has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears[,]' and 'in the eyes of the law, [the applicant] does not come before the Court as one who is 'innocent,' but . . . . as one who has been convicted by due process of law . . . .' " *Ex parte Harleston*, 431 SW3d 67, 70 (Tex App, 2014), quoting from *Herrera, supra*, 506 US at 399-400; 113 S Ct at 859-860. Thus, when a defendant has been "tried before a jury of his peers, with the full panoply of protections that our Constitution affords criminal defendants," *Herrera, supra*, 506 US at 419; 113 S Ct at 870, it is appropriate to apply an

"extraordinarily high" standard of review. *Id*., 506 US at 426; 113 S Ct at 874 (O'Connor, J., concurring).

A number of states that do recognize a free standing claim of innocence do apply an exceedingly high standard. These states require the defendant to prove by clear and convincing evidence that no reasonable juror could have found the defendant guilty in light of the new evidence. *Ex parte Harleston, supra*; *Engesser v Young*, 856 NW2d 471, 483-484 (SD, 2014); *State v Beach*, 370 Mont 163, 168; 302 P3d 47, 53 (2013); *Harris v Commissioner of Corrections*, 134 Conn 44, 49; 37 A3d 802, 806 (2012); *Montoya v Ulibarri, Warden*, 142 NM 89, 99; 163 P3d 476, 486 (2007); *People v Cole*, 1 Misc 3d 531, 542; 765 NYS 2d 477, 486 (2003).

As the Court observed in *Montoya*, the burden to prevail on a free standing claim of innocence is more rigorous than the standard imposed on a defendant making a motion for new trial on the basis of newly discovered evidence. 142 NM at 99; 163 P3d at 486. This was so, the Court said, because the latter standard, requiring a defendant to only show that the newly discovered evidence would probably change the result if a new trial were granted, did not go far enough to protect the public's interest in the finality of a conviction obtained after a defendant had been afforded all constitutional rights required by law. *Id*.

The People have already argued, and given reasons why, Scott's newly discovered evidence did not, and does not, warrant a new trial under the *Cress* standard. It seems axiomatic that if his newly discovered evidence does not satisfy this standard, it should not be found to satisfy the more stringent clear and convincing evidence standard.

Relief

Wherefore, the People respectfully request that this Honorable Court deny Defendant Scott's Application for Leave to Appeal.

Respectfully submitted,

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